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Opinion following transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN BOSEMAN CORDER et
al.,

Defendants and Appellants.

B261370

(Los Angeles County
Super. Ct. No. PA073839)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dalila Corral Lyons, Judge. Affirmed.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant Brian Boseman Corder.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant Frederika Carmouche.

Mark R. Yanis, under appointment by the Court of Appeal, for Defendant and Appellant Stephon Crutchfield.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Idan Ivri, Deputy Attorney General, David A. Wildman, Deputy Attorney General, for Plaintiff and Respondent.

This case involves charges against defendants and appellants Brian Boseman Corder, Fredericka Carmouche, and Stephon Crutchfield, based on an attack on Corder's wife, GiGi. In count 1, Corder and Carmouche were found guilty of conspiracy to commit murder.¹ (Pen. Code, § 182, subd. (a)(1).)² All three defendants were found guilty of willful, deliberate, and premeditated attempted murder in count 2 (§§ 187, subd. (a), 664, subd. (a)), torture in count 4 (§ 206), and mayhem in count 5 (§ 205).³ Carmouche and

¹ Crutchfield was found not guilty in count 1.

² All statutory references are to the Penal Code unless otherwise specified.

³ Defendants were found not guilty of aggravated mayhem in count 5, but were convicted of the lesser offense of mayhem.

Crutchfield were convicted of burglary in count 3.⁴ (§ 459.) The jury also found true the allegations that Carmouche and Crutchfield personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a)), and that Carmouche personally used dangerous and deadly weapons within the meaning of section 12022, subdivision (b)(1), in counts 2 and 3.⁵

The trial court sentenced Corder to 25 years to life in count 1, and imposed and stayed sentences pursuant to section 654 in counts 2, 4, and 5. Carmouche was also sentenced to 25 years to life in count 1, with the sentences in counts 2–5 and the section 12022, subdivision (b)(1), and section 12022.7, subdivision (a) enhancements imposed and stayed under section 654. Crutchfield was sentenced to life in prison in count 2, plus three years for personal infliction of great bodily injury, with sentences imposed and stayed under section 654 in counts 3–5.

On appeal, all three defendants contended that the trial court erred in allowing the jury to consider a natural and probable consequences theory of aiding and abetting the attempted premeditated murder in count 2, and in refusing to require the victim to review documents that she stated would not help refresh her memory. Corder and Carmouche further contended that: (1) the trial court erred in failing to sua sponte instruct on lesser included offenses of conspiracy

⁴ The burglary charge against Corder in count 3 was dismissed pursuant to a section 995 motion.

⁵ The jury found not true allegations that Crutchfield personally used a dangerous and deadly weapon.

to commit murder; (2) the trial court erred in allowing the jury to consider both an act subsequent to the target offense and the agreement itself as overt acts in furtherance of conspiracy to commit murder; (3) their convictions for torture were not supported by substantial evidence; and (4) they were prejudiced by cumulative errors at trial. Finally, Corder separately contended the trial court erred in prohibiting a defense witness from testifying in his Marine Corps uniform, and in excluding evidence that Corder suffered from posttraumatic stress disorder (PTSD).⁶ We affirmed the convictions. (*People v. Corder* (Dec. 19, 2016, B261370) [nonpub. opn.].)

Defendants all filed petitions for review arguing, in relevant part, that following the United States Supreme Court's opinion in *Alleyne v. United States* (2013) 570 U.S. 99 (*Alleyne*) and our Supreme Court's decision in *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), it would be error to allow conviction for attempted premeditated murder on a natural and probable consequences theory, despite our Supreme Court's earlier holding in *People v. Favor* (2012) 54 Cal.4th 868 (*Favor*) that premeditation need not be a natural and

⁶ In his opening brief, Corder joined in any contentions of his codefendants that accrued to his benefit. (Cal. Rules of Court, rule 8.200(a)(5).) Subsequent to filing her opening brief, Carmouche joined in several of the contentions listed above, providing additional argument by letter, filed with the court on May 17, 2016.

probable consequence for attempted premeditated murder liability.

Our Supreme Court granted Crutchfield’s petition for review but deferred briefing pending consideration and disposition of *People v. Mateo*, S232674 (*Mateo*) or further order of the court. (S239594, Mar. 22, 2017.) The issue presented for review in *Mateo* was: “In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should *People v. Favor*[, *supra*,] 54 Cal.4th 868 be reconsidered in light of *Alleyne*[, *supra*, 570] U.S. [99] and *People v. Chiu*[, *supra*,] 59 Cal.4th 155?”

After Senate Bill No. 1437 (Stats. 2018, ch. 1015, § 1(f), p. 6674) (S.B. 1437) went into effect on January 1, 2019, our Supreme Court transferred *Mateo* back to Division Four of the Court of Appeal, Second Appellate District.⁷ On April 10, 2019, the Supreme Court transferred the instant matter back to this court with directions to vacate our decision and reconsider the case in light of S.B. 1437.

We vacate our December 19, 2016 opinion and issue this revised opinion addressing all of defendants’ arguments,

⁷ The Court of Appeal, Second Appellate District, Division Four issued its unpublished decision in *Mateo* on July 9, 2019. (*People v. Mateo* (July 9, 2019, B258333).)

including their new arguments relating to S.B. 1437. We again affirm the trial court's judgment.

FACTS

Prosecution

GiGi and Corder's Relationship

GiGi, the victim, had been married to Corder for about six years at the time of the charged offenses. GiGi lived in an apartment in Canoga Park. Corder was an active duty member of the Marine Corps, stationed in San Pedro. Corder came home when he could.

GiGi and Corder had a rocky, sometimes violent, marriage. Corder tackled and punched GiGi once when she confronted him about e-mails he had sent to other women. GiGi's mother witnessed Corder straddling GiGi and punching her in the face. Corder tried to kill them both once by repeatedly turning off the car engine on a freeway, and then zigzagging between lanes. Corder threatened GiGi in their frequent arguments, saying things like: "Bitch, I'm done with you, I'm fucking going to kill you," and "You're fucking not going to wake up tomorrow morning. You're dead tonight." Corder told GiGi he would end up in jail for hurting her. GiGi admitted responsibility for some of the violence. She once hit Corder with a broom after he verbally abused her.

In March 2012, GiGi told Corder she was pregnant. Corder was irate. He told GiGi, “This is bad. This is all bad. This is going to kill us.” He also said, “Oh, my God, you need to have an abortion. We can’t have this baby. This will kill us.” He sent GiGi text messages threatening her and telling her to get an abortion. Corder threatened to stop paying the rent and the bills when GiGi told him that she would not get an abortion. They began receiving “three day” notices because Corder had not paid the rent. GiGi called Corder’s commanding officer and informed him that Corder had threatened her, pressured her to have an abortion, and stopped paying their bills. Corder’s attitude changed completely after the call. He apologized.

The Attack

GiGi, four months pregnant on June 15, 2012, was suffering from severe nausea. She contacted Corder that morning, asking him to come home and help her. He said that he would come as soon as he could, but he did not return. GiGi continued to text and call him throughout the day, becoming very angry. She texted Corder: “If you don’t come back and make this right, you will regret it, I promise you.”

Someone pounded on the front door of GiGi’s apartment around 10:00 o’clock that evening. GiGi went to see who it was and saw a finger covering the peephole, something Corder would often do, so she unlocked the door.

She went back to bed, thinking that Corder heard her unlocking it and would come in. Instead, she heard the door close. She texted Corder, “Where are you? Did you just come and leave? What happened?” Corder eventually called GiGi and told her he had not been at the door. He said he was at school and would be back soon.⁸

Around midnight, GiGi heard someone throwing rocks at her patio doors, something Corder would do when he forgot his keys. She turned on the outside light and saw Corder, who waved at her. GiGi turned off the light and went to open the front door for Corder. She was naked because she had just thrown up on her clothing.

When GiGi opened the door, Crutchfield burst through and tackled her to the ground “like a linebacker.” He straddled GiGi and punched her in the face relentlessly. GiGi fought back. She screamed for help. She screamed that she was pregnant, and called Corder’s name. She thought Crutchfield was going to rape her.

Carmouche came into the apartment behind Crutchfield. She rummaged through the kitchen cabinets, pulling out various objects, including candelabras, a Pyrex dish, and a frying pan, which she then used to hit GiGi on the head. GiGi was in terrible pain. She was afraid for her life and for her baby. Crutchfield continued to punch GiGi on her face and chest while Carmouche hit GiGi’s head. GiGi screamed, “My husband’s coming. I’m pregnant. Help

⁸ Corder attended the Los Angeles Film and Recording School.

me.” Someone responded, “Your husband’s not coming, bitch.” GiGi screamed and begged for help throughout the attack. One of her attackers said, “The bitch won’t die.” As this was happening, GiGi saw Corder sitting on the bed. She only saw his legs, but she was certain it was Corder. GiGi was hit in the face with a frying pan and lost two teeth. She believed that both Corder and Carmouche hit her with the frying pan at different times during the attack.

Carmouche grabbed GiGi’s neck and wrenched it so hard it went numb. Carmouche grabbed GiGi’s face, tilted GiGi’s head sideways, and sliced GiGi’s throat repeatedly with pieces of a broken Pyrex dish. She stabbed GiGi’s breasts. GiGi thought she was going to die, and that her attackers would not stop until they believed she was dead. She played dead to protect her baby. Carmouche covered GiGi’s nose and mouth with her hands until GiGi passed out.

When GiGi regained consciousness, she was lying on her bedroom floor surrounded by broken glass. She crawled to the phone on the nightstand and called her mother for help. The call ended when someone hit GiGi over the head and she blacked out a second time.

GiGi’s mother called 911 at 12:52 a.m. She told the dispatcher that her daughter had just called and was being attacked.

Kathy Aguirre was visiting her family in an apartment in the same building where GiGi resided. She heard a very loud thump and a woman screaming for help. The woman

also screamed that she was pregnant. Aguirre called the police at 12:41 a.m. They arrived soon afterward.

Jane Hankins, who also lived in the building, heard loud yelling, thumping, and glass breaking. A woman yelled, “Get out, get out, get out,” at least 50 times. “It was very severe, emotional yelling.” Hankins called 911 at 12:37 a.m. She told the dispatcher that someone was “just screaming their head off.” After she hung up the phone, the door to GiGi’s apartment slammed shut and Hankins heard someone sobbing.

The police called Hankins to get the security code for the building at 12:51 a.m. She could not remember the code, so she went to open the door. As she was going to the door, a man yelled, “Help. Somebody call 911.” She thought the man was GiGi’s husband or boyfriend.

Los Angeles Police Officer Jeffrey Johnson and his partner arrived at the apartment at around 12:40 a.m. The front door was partially open. GiGi was lying on the floor, covered in blood, with injuries to her head. Corder was tending to her. GiGi repeatedly asked about her phone and her dog. She did not answer the officers’ questions. The officers observed red stains on the wall over GiGi’s bed; her pillow; the nightstand; a folding knife and pink bowl on the nightstand; the carpeting, bedding, sliding glass door, and blinds; broken chair legs, one of which was found on the bed; a phone on the kitchen counter; a frying pan; a broken candelabra; a shoeprint in the kitchen; a fan; the exterior door knob; and outside of the apartment. There were broken

fixtures and furniture, including a fan and a chair. There was broken glass throughout the apartment. Broken teeth were discovered near the bed. It looked as if an “extreme struggle” had taken place.

Forensic Nurse Examiner Sandra Wilkinson examined GiGi at the Northridge Hospital emergency room on June 16, 2012. She observed numerous cuts on GiGi’s body, linear abrasions on her back, blood smears on the soles of her feet, and two missing fingernails, which were likely defensive wounds. GiGi had multiple cuts on both hands, which also appeared to be defensive wounds. GiGi had subconjunctival hemorrhages consistent with strangulation, a deep incision beside her right eyebrow, bruising to the neck and jaw, and numerous shallow and deep incisions. She sustained a cut close to the right carotid artery, which could have been fatal had the carotid artery been severed. GiGi’s lips were swollen; she had missing teeth, as well as a cut that created a total separation from her lip to her nose. There was a deep cut on GiGi’s right upper chest. Her entire body was smeared with blood.

The Investigation

Interviews of GiGi

Detective Rene January and her partner interviewed GiGi at 8:25 p.m. on June 16, 2012. The interview took place in the hospital, about an hour after GiGi was awoken from

an induced coma. A breathing tube had just been removed from GiGi's throat, and she was having difficulty speaking. GiGi was still groggy and felt "drugged." She said she "didn't know right from left."

GiGi told the detectives Corder had been outside throwing pebbles at the sliding glass door. She did not know there were people waiting to attack her. She was "99.999 percent" certain Corder had not done this to her. She said a man and a woman attacked her. Both of them had cut her with sharp objects. The man and the woman were hurting her simultaneously at one point in the attack.

Later, GiGi's mother asked her what had happened. GiGi said three people came into her apartment. Two of the people were strangers, but she thought the third person was Corder. Her vision was blurred, so she could not be certain. The female attacker kept saying, "Just die. Just die." GiGi thought the female attacker also said, "The bitch won't die. The bitch won't die." GiGi said she was naked when she was attacked.

GiGi's mother called the police to inform them that she was more alert and could remember additional details. Detective January conducted a second interview on June 18, 2012. Corder had been arrested by that time. GiGi told Detective January that Corder was sitting on the foot of the bed as her attackers were beating her. GiGi did not see Corder's face, but she had been married to him for years and

knew his legs and pants.⁹ She was certain Corder had been there.¹⁰

GiGi described the man who attacked her as Black with a short afro and buggy eyes. She thought he might have had some hair on his chin. He was about five feet six inches, or five feet eight inches, and in his 20s or 30s. The female attacker was a thin Black woman with short straightened black or brown hair. She was about five feet six inches to five feet seven inches tall. The woman wore blue denim capri pants with a belt, gloves, a pink shirt with writing and glitter on it, and a denim jacket that was shorter than her pink shirt. GiGi said the woman was wearing latex gloves, which she felt on her face during the attack.

GiGi thought her husband was outside during the initial attack, because he had just thrown pebbles at the sliding glass door. She told her attackers that her husband was outside. They responded, “Your husband is not coming,

⁹ Other witnesses had seen Corder wearing shorts. Hankins said that Corder was wearing shorts when he called out for someone to help GiGi. GiGi’s mother said that Corder was wearing shorts with blood on them at the hospital.

¹⁰ GiGi testified that at the time of the first interview she was having trouble accepting the fact her husband had done this to her. She had also originally told the police she put a robe on before answering the door because she was embarrassed about being naked.

bitch. Die, bitch, die.” Once she was on the ground, the first male attacker was “[p]unching her furiously, like a maniac.” GiGi remembered being hit with a skillet, a Pyrex dish, and five glass candelabras. The woman dropped the Pyrex dish on GiGi’s head, and then picked up pieces of the glass. She grabbed GiGi’s face, tilted her head sideways, and tried to slit her throat repeatedly. She looked GiGi in the eyes and stabbed her breasts.¹¹

Interview of Corder

Los Angeles Police Detectives Maria Dingman and Macchiarella spoke to Corder at Northridge Hospital on June 16. Corder said he had last spoken to GiGi at about 11:00 p.m. Corder went from the Marine base to his father’s home, and then attended a class from 8:30 p.m. to 11:30 p.m. He arrived at the apartment at about 12:15 a.m.

During the interview, Detective Macchiarella viewed text messages on Corder’s telephone. He asked Corder to show him a text message from “Fame.”¹² Corder said he deleted it.

¹¹ GiGi inconsistently stated that the female attacker only beat her on her head and cut her throat.

¹² “Fame” was a name used by Crutchfield.

Interview of Crutchfield

Detective Richard Moakley interviewed Crutchfield on June 16. Crutchfield said he had been at school for a morning class and spent the rest of the day with a friend. He did not mention going to GiGi's apartment.

Carmouche and Corder's Medical Examinations

Dr. William Jou treated Carmouche at the emergency room at Kaiser Panorama City Medical Center around 1:00 p.m. on June 16. Carmouche said she had cut her knee and hands when she fell on broken glass approximately 11 hours earlier.

Nurse Wilkinson examined Corder on June 16. She noted that there was blood on his hands, fingernails, and penis. He had superficial cuts.

The Relationship of the Three Defendants

Corder met Carmouche and Crutchfield at the Los Angeles Film and Recording School in Hollywood, which they all attended. On April 17, 2012, Carmouche texted Corder, "Morn, Lovely. Yes, I have been drawn to you since day one. We should def get together soon and chill. I have a good feeling about you" On May 4, 2012, Carmouche texted, "What are your turn-ons?" Corder replied, "Sexy outfits and touching, i.e., massages, oral, et cetera. All

relaxing things like that.” Carmouche sent texts to various people indicating that she and Corder were in a romantic relationship. On June 11, 2012, Carmouche texted Crutchfield that she loved Corder and would do “dumb shit” for him. On June 13, 2012, she texted Corder, “Believe no matter what I will take care and protect you” and “I wld do everything for you.” Carmouche texted a friend the same night, threatening to kill the friend if he interfered with her relationship with Corder. She texted, “Yes tht was a threat. I love Brian. Nothing will keep me from him. If u r willing to wrk around tht, then we are fine.” Carmouche texted Crutchfield around noon on June 16, 2012, “We’re so close and I really do love Brian. I have never actually loved any man before and for me to do dumb shit.” There were text messages between the three defendants in the days before GiGi was attacked.

Defendants’ Whereabouts Prior to the Attack

Records of the Los Angeles Film and Recording School indicated that all three defendants were enrolled, but that none had attended classes during the first week of June 2012. They were later dropped from their courses. On June 15, 2012, Corder’s identification badge was used to enter the school at 8:32 p.m. Still photographs from the school’s surveillance cameras showed Corder entering the lobby at 10:03 p.m., and walking around inside the building at 10:36 p.m. Corder’s cell phone records indicated that his phone

was near the school at 10:00 p.m. and that his phone was used to call Crutchfield's phone.

Carmouche's cell phone records indicated that her phone was near GiGi's apartment at 10:08 p.m., 10:40 p.m., and 10:41 p.m. Crutchfield's phone records placed his phone near the film school at 11:26 p.m. and 11:30 p.m. In a deleted text Crutchfield sent to Corder at 11:31 p.m. on June 15, he wrote, "Outside." Video surveillance from the school showed Crutchfield entering the building at 11:32 p.m. The surveillance video showed Corder in the film school at 11:27 p.m., and leaving the building at 11:35 p.m.

*Defendants' Whereabouts and Communications
Following the Attack*

Cell phone records showed calls of 30-second duration between Carmouche and Crutchfield at 12:53 a.m. and 12:55 a.m. on July 16. Ten telephone calls were placed from Carmouche's phone between 12:53 a.m. and 1:51 a.m., including one to Crutchfield. Phone records showed that Crutchfield's phone was still in Canoga Park at 12:54 a.m.

Corder's phone received several text messages between 3:53 a.m. and 4:33 a.m., including a message from Crutchfield at 4:33 a.m. There was an 11-minute call between Corder and Crutchfield at 4:22 a.m.

Physical Evidence

On June 20, 2012, four swabs that showed a positive reaction for possible blood were collected from a 2005 silver Jaguar. The Jaguar was owned by Corder's father and Corder drove it regularly. Also collected were swabs of possible biological material from the mouth of a water bottle, the mouth of a plastic bottle in the rear left foot space, the textured grip of an airsoft pistol found in the car, and the rear-facing edge of the front right backrest. Corder's clothing, including his boots, socks, green swimming trunks, and white plaid shorts, were collected for analysis.

Criminalist Monica Zielinski took swabs from the screen and keypad of the cell phone recovered from GiGi's kitchen counter for DNA testing. She also took a reference sample of GiGi's blood, and buccal swabs from Corder, Carmouche, and Crutchfield.

Criminalist King Chow sent samples from bloodstains from the rear center seat of Corder's car, the right seat, the interior right door, and the rear bumper; white, green and yellow shorts; gray and black Air Jordan shoes; a steel folding knife; and a frying pan for DNA testing. All of the items had reddish stains and a preliminary test for blood yielded positive results.

DNA analyst Stephanie Sivak initially received six items of evidence, including two swabs from the cell phone and the reference samples from GiGi and defendants. She later received four samples from stains in the Jaguar, two

samples from red stains on a knife, two samples from red stains on a frying pan, one sample from a red stain on a pair of shorts, and one sample from a red stain on a right shoe. The red stain from the rear center seat of the Jaguar matched Carmouche's DNA profile. A stain from the front right seat contained a mixed profile, with Carmouche as the major contributor and GiGi as a minor contributor. The red stain on the rear bumper matched GiGi's DNA profile. The red stain from the interior right door of the car and the stain on the shorts both matched Crutchfield's DNA profile. The stain from the handle of the frying pan matched Carmouche as the major DNA contributor and GiGi as the minor contributor. The red stains on the bottom of the frying pan matched GiGi's DNA profile. The red stain on the right shoe contained a mixture of DNA profiles, including GiGi's DNA profile as the major contributor and Carmouche's as the minor contributor.

On June 20, 2012, 29 fingerprints were lifted from the Jaguar. The prints from the outside of the trunk were Carmouche's fingerprints, prints from the inside of the passenger door were Crutchfield's, and prints from inside the driver's side front door pocket were Corder's.

A search of Carmouche's residence yielded a wig with reddish-brown hair, a pink tank top, and a pair of black jeans.

Crutchfield

A forensic print specialist testified that prints from the folding knife found in GiGi's apartment did not match Crutchfield's fingerprints.

Crutchfield's mother, his aunt, and the assistant principal from his high school testified to his good character.

Crutchfield testified on his own behalf. He met Corder and Carmouche in a class at the Los Angeles Film and Recording School. He believed Carmouche had a romantic interest in Corder, but the feeling was not mutual. Corder told Crutchfield that GiGi was mistreating him and hitting him. Corder and Crutchfield agreed that Crutchfield would scare GiGi so that Corder could "rescue" her. The plan was for Corder to throw stones at the patio doors so that GiGi would unlock the front door for Crutchfield to get inside the apartment. Corder said he thought he could make GiGi appreciate him more by playing the hero. Crutchfield knew GiGi was pregnant and believed that Corder wanted the baby.

Carmouche was not originally included in the plan to scare GiGi. Crutchfield asked her if she wanted to participate on the night of the attack, and Carmouche agreed. Crutchfield and Carmouche did a "test run" that

¹³ Carmouche did not present testimony or evidence on her own behalf.

night to familiarize themselves with the building. Crutchfield covered the peephole on GiGi's apartment door with his finger so she would not see him.

After the test run, Carmouche and Crutchfield returned to the film school, where they had been earlier that evening. Defendants drove from the school to GiGi's apartment building. As they were waiting for GiGi to open the apartment door, Crutchfield saw that Carmouche was carrying a folding knife, but he did not say anything about it to her. He also noticed that Carmouche was wearing gloves.

When GiGi opened the door, Crutchfield punched her, and she stumbled backward. He punched GiGi again and straddled her, punching her several more times. In total, Crutchfield punched GiGi about six or seven times. He felt sick to his stomach because he did not like what he was doing.

Crutchfield heard Carmouche say, "Get her, get her." She also said, "Your husband is not coming, bitch." Crutchfield was attacked by GiGi's dog, so he ran into another room, where he could not see what Carmouche was doing. He heard glass breaking several times.

Crutchfield and Carmouche left the apartment and ran to Corder's car, which was parked a few blocks away. When they got back to the car, Corder asked what happened to GiGi. Crutchfield said he did not know. Carmouche did not say anything.

Crutchfield did not want to kill GiGi. He never agreed to cut her neck. He thought he would help Corder's

relationship with GiGi by roughing her up. The situation escalated when GiGi fought back.

Corder

Monda Fakhroo testified that she was visiting friends at the apartment building where GiGi lived on June 15 or 16, 2012. Fakhroo saw a Black man jump over a fence. The man asked if anyone heard his wife screaming.

Marine Sergeant Lonel Springs testified that he met Corder when they were stationed together at Camp Pendleton in 2005. They served in Fallujah together. On one occasion, Springs had seen GiGi hit Corder with a broom, which she held like a baseball bat. Corder had a reputation for being level-headed, calm, cool, and collected.

DISCUSSION

Attempted Premeditated Murder—Natural and Probable Consequences

The jury convicted defendants of attempted willful, deliberate, and premeditated murder. The court instructed the jury it could find defendants guilty of attempted murder as direct perpetrators, direct aiders and abettors, or as aiders and abettors under the natural and probable consequences doctrine. (CALCRIM Nos. 400 [Aiding and Abetting: General Principles]; 401 [Aiding and Abetting:

Intended Crimes]; 403 [Natural and Probable Consequences]; and 600 [Attempted Murder].) It further instructed the jury that, if it found defendants guilty of attempted murder, it must next determine whether the attempted murder was willful, deliberate, and premeditated. (CALCRIM No. 601.)

On appeal, defendants contended the trial court's instructions were deficient under *Chiu, supra*, 59 Cal.4th 155, which held that an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine. (*Id.* at p. 166.) Defendants asserted that *Chiu* should be equally applicable to attempted premeditated murder, because otherwise a defendant could face a life sentence without a jury finding either a personal intent to kill or premeditation. According to defendants, the verdict did not reflect which theory or theories the jury relied upon in reaching its verdicts, such that their *convictions* for attempted premeditated murder should have been reversed. (*Id.* at p. 167 [reversal is required where court instructs on a legally incorrect theory, unless there is a basis in the record to find that the verdict was based on a legally correct ground].) Defendants acknowledged that *Favor, supra*, 54 Cal.4th 868, which held that premeditation need not be a natural and probable consequence for attempted premeditated murder liability, was contrary to their argument, and that the *Chiu* court distinguished *Favor*. Nonetheless, they argued that *Favor* conflicts with *Chiu*, and should be reconsidered.

Although defendants' appellate briefs were not explicit, we assumed their contention under the reasoning of *Chiu* was that the attempted murder convictions could stand, but that the finding of premeditation and deliberation must be stricken. *Chiu* does not preclude conviction of murder for an aider and abettor under the natural and probable consequences doctrine; the case precludes liability for first degree murder.

At the time of defendants' appeal, our Supreme Court had granted review to consider the continuing validity of *Favor* in light of *Chiu* and the United States Supreme Court's opinion in *Alleyne*. (*People v. Mateo*, review granted May 11, 2016, S232674.)

On January 1, 2019, while *Mateo* was still pending, S.B. 1437 went into effect. The legislation's stated purpose is to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1(f), p. 6674.) Shortly thereafter, the Supreme Court transferred *Mateo* back to Division Four of the Court of Appeal, Second Appellate District, without passing on *Favor*. On April 10, 2019, the California Supreme Court transferred the instant matter back to this court with directions to vacate our decision and reconsider the case in light of S.B. 1437.

Following transfer back from the Supreme Court, defendants contend that we should vacate their attempted premeditated murder convictions pursuant to S.B. 1437. Defendants' contention rests on the flawed assumption that the jury may have based the guilty verdicts in count 2 on the natural and probable consequences theory of aiding and abetting. As in our prior opinion, we conclude that all three defendants were necessarily convicted as either direct perpetrators or direct aiders and abettors in the attempted premeditated murder, such that neither *Chiu* nor S.B. 1437 bars their convictions of attempted premeditated murder.

Carmouche was a direct perpetrator of the attempted murder. After beating and stabbing GiGi mercilessly in the head and chest, she sliced GiGi's throat numerous times and then held her hands over GiGi's nose and mouth until GiGi lost consciousness. It cannot be seriously argued that Carmouche was convicted of attempted murder on an aiding and abetting theory rather than as a direct perpetrator.¹⁴ She assaulted the victim in a variety of ways, including cutting her throat, while verbally stating an express intent to kill. The jury had no reason to resort to the natural and

¹⁴ On appeal, Carmouche admitted that her attorney conceded this in closing argument, but asserted that "trial counsel also argued [she] was an aider and abettor at points during the offense during his closing argument." The record cite that Carmouche provided in support of this assertion shows that counsel argued Carmouche aided and abetted a *burglary*, which is irrelevant to her role in the attempted murder.

probable consequences doctrine as to Carmouche, nor did the prosecutor rely on that theory. Carmouche's conviction of attempted willful, deliberate, and premeditated murder is not dependent on the continued validity of the holding in *Favor* in the wake of *Chiu*, and is unaffected by S.B. 1437, which concerns liability under the felony murder and natural and probable consequences theories of guilt only.

As to Crutchfield, we hold that the record, including his own testimony, demonstrates that he was either a direct perpetrator or a direct aider and abettor. The instructions on natural and probable consequences were superfluous as to Crutchfield's case. We reach this conclusion based on the following portion of *People v. McCoy* (2001) 25 Cal.4th 1111, 1120 (*McCoy*):

“[T]he dividing line between the actual perpetrator and the aider and abettor is often blurred. It is often an oversimplification to describe one person as the actual perpetrator and the other as the aider and abettor. When two or more persons commit a crime together, both may act in part as the actual perpetrator *and* in part as the aider and abettor of the other, who also acts in part as an actual perpetrator. Although Lakey was liable for McCoy's actions, he was an actor too. He was in the car and shooting his own gun, although it so happened that McCoy fired the fatal shots. Moreover, Lakey's guilt for *attempted* murder might be based entirely on his own actions in shooting at the attempted murder victims. In another shooting case, one person might lure the victim into a trap while another fires

the gun; in a stabbing case, one person might restrain the victim while the other does the stabbing. In either case, both participants would be direct perpetrators as well as aiders and abettors of the other. The aider and abettor doctrine merely makes aiders and abettors liable for their accomplices' actions as well as their own. It obviates the necessity to decide who was the aider and abettor and who the direct perpetrator or to what extent each played which role."

Crutchfield's conduct falls within the examples of a direct perpetrator and direct aider and abettor set forth in *McCoy*, *supra*, 25 Cal.4th at page 1120. (See *People v. Delgado* (2013) 56 Cal.4th 480, 487 [citing the examples in *McCoy* with approval].) By his own admission in his testimony, it was Crutchfield who first rushed into the apartment and overwhelmed GiGi. Crutchfield rendered GiGi helpless by repeatedly punching her. He punched GiGi on her face and chest while Carmouche hit GiGi's head, demonstrating that the two acted together in committing the attempted murder. Significantly, the jury found that Crutchfield personally inflicted great bodily injury, a finding consistent with his role as a direct perpetrator whose conduct facilitated Carmouche's attempts to murder GiGi. Proof of Crutchfield's guilt did not call into play the doctrine of natural and probable consequences.

We reach the same conclusion as to Corder, but for different reasons. Corder was convicted in count 1 of conspiracy to commit murder, meaning the jury found that

Corder had the requisite mental state of premeditation as a matter of law. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1226 [conspiracy to commit murder is necessarily conspiracy to commit premeditated first degree murder].) Corder concedes in his opening brief that his conviction of conspiracy to murder undermines his contention, although he makes additional arguments to avoid this problem, which we discuss and reject later in this opinion.

The doctrine of natural and probable consequences did not apply factually to any of defendants. The trial court's decision to instruct on the doctrine was the type of instructional defect amounting to a technical error, which does not constitute ground for reversal. (See *People v. Cross* (2008) 45 Cal.4th 58, 67; *People v. Rowland* (1992) 4 Cal.4th 238, 282.) The prosecutor did not rely on the natural and probable consequences doctrine at all as to Carmouche, and for good reason, as she unquestionably was a direct perpetrator. As to Crutchfield and Corder, the prosecutor argued direct aiding and abetting, but did not rely on the natural and probable consequences doctrine, which she discarded as "just an alternate theory the judge read to you." The prosecutor emphasized Corder's guilt on the attempted murder charge under the conspiracy to commit murder charge in count 1.

We are satisfied "there is a basis in the record to find that the verdict [of premeditation and deliberation] was based on a valid ground." (*Chiu, supra*, 59 Cal.4th at p. 167, citing *People v. Guiton* (1993) 4 Cal.4th 1116, 1128–1129,

and *People v. Green* (1980) 27 Cal.3d 1, 69–71.) Carmouche and Crutchfield were either direct participants or direct aiders and abettors under any interpretation of the evidence, with no basis for instructions on natural and probable consequences. The jury’s conviction of Carmouche and Corder on the charge of conspiracy to commit murder establishes their mental state of premeditation and deliberation as a matter of law. We conclude that even if *Favor* is ultimately overruled by our Supreme Court, or either *Chiu* or S.B. 1437 is held to apply to attempted premeditated murder, the result in this case will remain the same.

Conspiracy to Commit Murder—Overt Acts

On appeal, Corder and Carmouche contended that their convictions for conspiracy to commit murder must be reversed because two of the overt acts alleged to have been made in furtherance of the conspiracy to commit murder were invalid. They argued that it is impossible to know whether the verdicts were based on proper overt acts because the jury is not legally required to unanimously agree regarding which overt acts have been committed, and in this case the verdict forms did not indicate which acts formed the basis for the verdicts. We need not discuss the merits of the contentions, because any error is harmless.

The Law of Conspiracy

“A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act “by one or more of the parties to such agreement” in furtherance of the conspiracy.’ [Citations.]” (*People v. Johnson* (2013) 57 Cal.4th 250, 257 (*Johnson*).) A defendant cannot be convicted unless at least one overt act is alleged and proved by the prosecution; the existence of an agreement in the absence of an act done in furtherance of that agreement is insufficient to impose liability. (§ 184; *People v. Brown* (1991) 226 Cal.App.3d 1361, 1367 (*Brown*).)

““[A]n overt act is an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime.” [Citations.]’ [Citation.]” (*Johnson, supra*, 57 Cal.4th at p. 259.) An overt act must be performed before the commission of the offense that was the object of the conspiracy. (*Brown, supra*, 226 Cal.App.3d at p. 1369.) An act committed after the commission of the offense provides insufficient evidence to support a conviction. (*Id.* at pp. 1367–1370.) It is not necessary that each of the conspirators committed the overt act, or that the act be an element of a crime or an attempt to commit a crime. (*Id.* at p. 1369.) Although the jury must be in agreement that an overt act occurred, it is not required to agree as to the

particular act committed. (*People v. Russo* (2001) 25 Cal.4th 1124, 1131, 1133.)

A conviction of conspiracy does not require that the object of the unlawful agreement be completed. (*Johnson, supra*, 57 Cal.App.4th at p. 257.) In general, a conspiracy ends “when the substantive crime for which the coconspirators are being tried is either attained or defeated. [Citations.] It is for the trier of fact—considering the unique circumstances and the nature and purpose of the conspiracy of each case—to determine precisely when the conspiracy has ended.” (*People v. Saling* (1972) 7 Cal.3d 844, 852.)

Proceedings

The jury was instructed regarding conspiracy to commit murder under CALCRIM No. 563. The instruction identified the following overt acts: (1) Defendants created a plan to kill GiGi; (2) Corder drove Carmouche and Crutchfield to GiGi’s residence; (3) Corder used his relationship with GiGi to get her to open the door to her residence so that Carmouche and Crutchfield could enter and attack her; (4) Carmouche and Crutchfield beat and stabbed GiGi using numerous weapons stating, “The bitch won’t die”; and (5) Corder drove Carmouche and Crutchfield from GiGi’s residence after they attempted to kill her. The jury was also told that: “The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit

that crime. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime. [¶] . . . The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself.”

In closing argument, the prosecutor argued that circumstantial evidence strongly suggested Corder returned to GiGi’s apartment to “finish the job.” She stressed that the evidence showed Corder was the person who hit GiGi over the head in a final attempt to kill her when she was phoning her mother for help:

“Then defendant Carmouche took her gloved hand and put it over [GiGi’s] nose and mouth, moving it back and forth, trying to suffocate GiGi. Then GiGi lost consciousness.

“The next thing she knows, she’s crawling over to that bed side table where she had kept her cell phone so that she can call for help.

“She gets to her cell phone. She is able to call her mom, and you heard the 911 call -- well, you heard Denise Byrd’s 911 call where she’s telling the police that her daughter GiGi just called her, and that during that phone conversation, the phone goes dead.

“So while GiGi is on the phone, she gets hit with something. She gets hit so hard she loses consciousness yet again. So how did that happen? Who knocked GiGi out? Who hung up the phone? Who placed that phone on the kitchen where officers found it?

“We know it wasn’t GiGi. There’s not a trail of blood leaving [*sic*] leading from where she was to the kitchen.

“Who is the likely person here?”

“The likely person is Brian Corder. He is the individual who dropped off Carmouche and Crutchfield two blocks away, and he goes back to the house to finish the job. He gets there. He sees that GiGi is on the phone. He realizes he has to do something. He takes whatever object he could find -- we don’t know what it is. Close to the bed was a big wooden chair leg. And he hits her, and that’s how she loses consciousness.

“He ends the conversation and he places that phone in the kitchen.”

Soon afterward, the prosecutor discussed the significance of overt acts in furtherance of the conspiracy, stating to the jury: “remember you only have to find that [defendants] committed one. There is a laundry list, but they only need to commit one overt act.” She then identified the alleged overt acts that the jury was to consider, and discussed the evidence in support of each one.

Corder’s counsel attempted to combat the prosecutor’s theory:

“[T]he fly in the ointment in this case for the prosecution is the fact that [Corder] came back. He jumped over the fence, as Monda Fakroo said, asking, ‘did you hear my wife scream,’ and disappeared. This is before the ambulances came, before anybody came. He returned. Evidence that he is not intending to kill her.”

Corder's counsel continued:

"Now, all of a sudden, it changes to the fact that he came back and he hit her with a chair leg. How ridiculous is that? I mean, if he wanted to kill her and he received information that his buddies failed, and he wasn't in that apartment, which he wasn't -- the evidence is pretty conclusive, in my opinion, as to that -- then why not take off? Why go back and risk it?"

In rebuttal, the prosecutor responded:

"Someone knocks her out. Someone ends the phone call. Someone takes that phone and moves it to the kitchen counter. We know it wasn't defendant Carmouche or defendant Crutchfield because they are not just going to sit around watching her crawl to the phone and then make a phone call. They are going to get out of there as soon as they're done.

"We know it's not GiGi because there's no blood trail, and, as you can see from the photos, she was covered in blood.

"We know it's not the police officers, because the phone is on the kitchen counter when they arrive. There was testimony to that effect.

"Now the defense didn't present any reasonable alternative for the only person left in the scenario who possibly could have knocked GiGi out and moved the phone. That's defendant Brian Corder."

The jury convicted Corder and Carmouche of conspiracy to commit murder, but found Crutchfield not

guilty. The verdict forms did not indicate which specific overt acts, if any, the jury unanimously agreed upon.

Discussion

Corder and Carmouche challenged their convictions of conspiracy to commit murder by arguing that (1) Overt Act Number 1 merely alleged the agreement itself, rather than a step in furtherance of the conspiracy, and (2) Overt Act Number 5 occurred after the conspiracy was complete.¹⁵ There is no need to discuss the merits of either argument because the convictions of attempted murder establish the existence of an overt act as a matter of law.

Even if the trial court erred by allowing the jury to consider Overt Act Numbers 1 and 5, any error is harmless beyond a reasonable doubt. “[A] reviewing court must conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory.” (*People v. Chun* (2009) 45 Cal.4th 1172, 1201 (*Chun*).) A court may do so not only where “the jury verdict on other points effectively embraces” the one at issue but also where “it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well.” [Citation.]” (*Id.* at p. 1204.)

¹⁵ No objection was raised in the trial court to these overt acts. The Attorney General did not argue Corder and Carmouche forfeited the issue, and we resolve it on grounds other than forfeiture.

Our Supreme Court has held that “[c]ommission of the target offense in furtherance of the conspiracy satisfies the overt act requirement.” (*People v. Jurado* (2006) 38 Cal.4th 72, 121; see also *People v. Padilla* (1995) 11 Cal.4th 891, 966 [overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800].) Although the murder itself was not completed, the jury convicted defendants of attempted murder, which “requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.” (*People v. Lee* (2003) 31 Cal.4th 613, 623 (*Lee*).) It is clear that the jury’s guilty verdict with respect to attempted murder “effectively embraces” the issue of whether an act was completed in pursuance of the conspiracy (*Chun, supra*, 45 Cal.4th at p. 1201), and demonstrates definitively that ““an outward act [was] done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime.” [Citations.]’ [Citation.]” (*Johnson, supra*, 57 Cal.4th at p. 259). The overt act requirement is satisfied, as a matter of law, by Corder and Carmouche’s convictions of attempted murder. For these same reasons, any error in instructions on overt acts 1 and 5 was necessarily harmless.¹⁶

¹⁶ Carmouche’s counsel expressly conceded in argument to the jury that there was no question the overt acts were committed. He also stated, “[Did Carmouche] inflict great bodily injury? [¶] Come on. Look at the

Conspiracy to Commit Murder—Lesser Included Offenses

Corder and Carmouche contended that the trial court erred in failing to sua sponte instruct on lesser included offenses of conspiracy to murder, including conspiracy to commit assault, assault with a deadly weapon, and assault with force likely to produce great bodily injury. There is a split of authority as to whether allegations of overt acts are to be considered in determining if there are lesser offenses of conspiracy under the accusatory pleading test. *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1707 (*Fenenbock*) held that overt act allegations are not properly considered for determining whether there are lesser offenses of conspiracy. *People v. Cook* (2001) 91 Cal.App.4th 910, 918 (*Cook*) reached the opposite conclusion, holding that the pleading of overt acts puts a defendant on notice of the facts alleged and may be considered in determining whether conspiracy to commit lesser crimes were committed under the accusatory pleading test. We need not choose between the holdings in *Fenenbock* and *Cook*, or attempt to parse the

pictures. I will not sit here and insult your intelligence and say she didn't. She did. No question about it." "The blood? . . . They went in there to rough her up. That should be no surprise." He also stated that Carmouche had "obviously" hit GiGi with a frying pan, as supported by the DNA evidence.

analyses in the cases, because any error in failing to instruct on conspiracy to commit a lesser included offense is nonprejudicial given the jury's verdict finding defendants guilty of attempted willful, deliberate, and premeditated murder.¹⁷

Failure to instruct sua sponte on a lesser included offense in a noncapital case does not require reversal “unless an examination of the entire record establishes a reasonable probability that the error affected the outcome.” (*People v. Breverman* (1998) 19 Cal.4th 142, 165 (*Breverman*).) “Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.” (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) This type of error is prejudicial “only if, ‘after an examination of the entire cause, including the evidence’ (Cal. Const., art. VI, § 13), it appears ‘reasonably probable’ the defendant would have obtained a more favorable outcome had the error not occurred ([*People v.*] *Watson* [(1956)] 46 Cal.2d 818, 836).” (*Breverman, supra*, at p. 178, fn. omitted.)

By convicting Corder and Carmouche in count 2 of the attempted willful, deliberate, and premeditated murder of GiGi, the jury necessarily found each had the specific intent to kill required for conspiracy to commit murder, rather than

¹⁷ Earlier in this opinion, we have upheld defendants’ conviction of attempted willful, deliberate, and premeditated murder against other challenges.

some lesser intent. (*People v. Smith* (2005) 37 Cal.4th 733, 739 [“[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing”]; *Lee, supra*, 31 Cal.4th at p. 623.) The jury’s verdict unambiguously shows that Corder and Carmouche acted with the specific intent to kill, rather than an intent to commit some lesser form of assault.

We also conclude any error was harmless given the strength of the conspiracy charge against Corder and Carmouche. Unlike Crutchfield (who had no apparent personal motive to kill GiGi), Corder and Carmouche had an independent motive to kill GiGi—to eliminate her and the unborn baby in order to carry on their romantic relationship. There is no credible evidence that Crutchfield and Carmouche agreed to merely assault GiGi as part of a far-fetched plan by Corder to win back her affection, a result that would have been at odds with Corder’s desire to terminate the pregnancy and Carmouche’s intent to foster her romantic interest in Corder. “In determining whether a failure to instruct on a lesser included offense was prejudicial, an appellate court may consider ‘whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.’” (*People v. Breverman, supra*, 19 Cal.4th at p. 177; see also *People v. Sakarias* (2000) 22 Cal.4th 596, 621 [error harmless when evidence supporting lesser offense was

weak].)” (*People v. Rogers* (2006) 39 Cal.4th 826, 870.) This is such a case.

Scope of Cross-Examination

Crutchfield, joined with brief comment by Corder and Carmouche, argued that GiGi’s refusal on three occasions while testifying to review certain documents because she believed the documents would not refresh her memory was a deliberate attempt to evade cross-examination in violation of the Sixth Amendment right to confront witnesses and Fourteenth Amendment right to due process. Crutchfield specifically contends that “[i]t was error to allow [GiGi] to refuse to look at a document and see if it would trigger her memory, and . . . it was error not to allow the defense to introduce that prior statement so the jury could evaluate whether it was true and whether GiGi was being hostile to the defense, a fact which the jury could properly consider in evaluating her testimony.”

GiGi’s testimony covered approximately 327 pages of reporter’s transcript. She was subjected to extensive cross-examination. The three instances disputed by defendants do not arguably result in a violation of their rights to confront and cross-examine a witness. Defendants also cannot establish prejudice, as a detective testified to GiGi’s statements as to two of the disputed matters, and the detective was never questioned as to the third. The contention is entirely without merit.

Proceedings

During Crutchfield's cross-examination of GiGi, she answered numerous questions and reviewed documents five times to refresh her memory at counsel's request before she declined to review a document because it would not assist her recollection. Her memory was successfully refreshed twice. When questioned about her statements to police with respect to Crutchfield's knowledge of Carmouche's participation in the attack, GiGi stated that reviewing a transcript would not refresh her memory:

"[Crutchfield's counsel]: Didn't you previously tell the detectives that while Mr. Crutchfield was straddling you, beating you, he didn't know that Ms. Carmouche was hitting you over the head with items?

"[GiGi]: How would he not know? He's straddling me and she's hitting me in the head. That doesn't even make any sense.

"[Carmouche's counsel]: Objection. Nonresponsive. Motion to strike.

"The Court: Sustained. Stricken.

"[Crutchfield's counsel]: Did you tell the detectives that, though?

"[GiGi]: Not that I remember.

"[Crutchfield's counsel]: Would it refresh your recollection to look at the --

"[GiGi]: No.

“[Crutchfield’s counsel]: Your Honor, may I read the transcript to her?

“The Court: No. She said it would not help her refresh her recollection. Go on to the next question.”

Following this, Crutchfield’s counsel asked GiGi whether reviewing documents would refresh her memory three more times, and she agreed that it might. In two instances, reviewing the documents was helpful. In another instance, counsel withdrew her question. Counsel then questioned GiGi regarding whether she made statements to the police with respect to Corder:

“[Crutchfield’s counsel]: Three different occasions in the first interview with the detectives, you told them you were afraid and they better get [Corder] before he gets to and kills or hurts whoever did this to you?

“[GiGi]: I don’t remember that.

“[Crutchfield’s counsel]: Would it refresh your recollection?

“[GiGi]: I don’t remember.

“[Crutchfield’s counsel]: Would it refresh your recollection to look at the transcript?

“[GiGi]: No. No.

“The Court: She said no. Next question.

“[Crutchfield’s counsel]: Is the Court going to allow me to impeach her with her statement?

“The Court: No, because she said she doesn’t remember.”

“[Crutchfield’s counsel]: Did you tell the detectives on the first interview that you were 99.999 percent sure that it wasn’t [Corder]?”

“[GiGi]: I don’t remember that. . . . [¶] . . . [¶] . . . [¶]

“[Crutchfield’s counsel]: Would it refresh your recollection to review the transcript?”

“[GiGi]: No, because I don’t remember it.”

Soon afterwards, the court recessed for the day. Out of the presence of the jury, the court reminded the defense that “I don’t remember” was not necessarily an inconsistent statement that would open the door to impeachment.

The next day Crutchfield’s cross-examination of GiGi continued. At sidebar, counsel expressed concern regarding whether she would be permitted to impeach GiGi with statements that GiGi could not remember making to police.

“[Crutchfield’s counsel]: In light of GiGi’s previous testimony, I don’t want to be in a position where we’re not allowed to impeach her with Detective January’s testimony, based on a lot of things she said that she could not remember. She also did not even care to or agree to look at some of the defense documents in trying to refresh her recollection. She just won’t look at it to see.

“The Court: Because she said if you presented such a document, that it would not refresh her recollection. [¶] She is not required to look at anything unless she says it would assist her in refreshing her recollection. If a witness says it will not help her refresh her recollection, that’s it. [¶] So it is not that she’s refusing to look at the document. She said

two or three times that looking at a document would not refresh her recollection.

“[Crutchfield’s counsel]: And it is my perception, based on her previous testimony through the trial, that that’s her position, saved just for the defense. [¶] I understand emotionally why she would not want to assist us, but she is not being that uncooperative with the [Deputy] District Attorney. I don’t think there is a time where she will tell the [Deputy] D.A., ‘no, it won’t refresh my recollection.’

“The Court: You’re speculating. There hasn’t been a time where the [Deputy] District Attorney has asked her to refresh her recollection and she says whether it would help her or not. [¶] Did you ever ask her to refresh her recollection?

“[Prosecutor]: No. [¶] My understanding is she already stated she was super out of it and on drugs, and just came off a breathing tube during the first interview, and she doesn’t remember what she told detectives, and counsel keeps asking her, and she doesn’t remember.

“[Crutchfield’s counsel]: So is it the court’s position the court will allows us, for things she says she didn’t remember and/or didn’t remember and it wouldn’t refresh her recollection to look at a document, will we be allowed to introduce her statements through the detective?

“The Court: You cannot impeach her unless there is an inconsistent statement. Her saying ‘I don’t remember’ occasionally, based on what I have heard so far, it is not deliberately evasive. It is not intentionally trying to -- that

is my opinion and my finding, that I do not find when she says ‘I don’t remember,’ given the circumstances in this case, it is very clear to me that she is not being deliberately evasive. [¶] So it is not -- ‘I do not remember that word’ does not necessarily equate to inconsistent. It does in certain cases. Not in this case.”

After continuing discussion on the issue, the trial court reiterated: “I just want to make sure you’re clear, [counsel]. [¶] At this point I do not find the witness is being deliberately evasive when she answers ‘I don’t remember’ or ‘I don’t know.’ I have not seen that at all. I have been watching her very clearly. [¶] In this case, more than any other, I have not seen any hint of that. She’s very forthright. She does not appear to be intentionally falsifying the ‘I don’t know,’ or trying to avoid the answer.”

Law

“The Sixth Amendment of the United States Constitution grants a criminal defendant the right to confront adverse witnesses.” (*People v. Lopez* (2012) 55 Cal.4th 569, 573.) “Cross-examination may expose facts from which jurors can appropriately draw inferences about the reliability of a witness, including the possibility of bias. The trial court, however, has wide latitude to restrict such cross-examination, and such testimony is properly barred unless the defendant can show the prohibited cross-examination would have produced a significantly different

impression of the witness's credibility.' (*People v. Brady* (2010) 50 Cal.4th 547, 560; see *People v. Smith* (2007) 40 Cal.4th 483, 513.)" (*People v. Capistrano* (2014) 59 Cal.4th 830, 866.)

"The trial court has broad discretion under Evidence Code section 765 to exercise control over interrogation of witnesses and protect them from undue harassment or embarrassment. (*People v. Tafoya* (2007) 42 Cal.4th 147, 175 [(*Tafoya*)]; [*People v.*] *Spence* [(2012)] 212 Cal.App.4th [478,] 517 [(*Spence*)].) On appeal, we apply the abuse of discretion standard in reviewing a trial court's exercise of its authority under Evidence Code section 765. (*Tafoya*, at p. 175; *Spence*, at p. 517.)" (*People v. Chenault* (2014) 227 Cal.App.4th 1503, 1514.)

Feigned memory loss does not implicate the constitutional right to cross-examine witnesses. "The circumstance of feigned memory loss is not parallel to an entire refusal to testify. The witness feigning memory loss is in fact subject to cross-examination, providing a jury with the opportunity to see the demeanor and assess the credibility of the witness '[T]he traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness's demeanor satisfy . . . constitutional requirements.' (*United States v. Owens* [(1988)] 484 U.S. [554,] 560.) In the face of an asserted loss of memory, these protections 'will of course not always achieve success, but successful cross-examination is not the constitutional

guarantee.’ (*Ibid.*)” (*People v. Gunder* (2007) 151 Cal.App.4th 412, 420 (*Gunder*).)

Discussion

Based on the above authorities, we reach the following conclusions. First, GiGi was subject to constitutionally adequate cross-examination designed to demonstrate her bias and lack of recollection. After over 300 pages of examination in the reporter’s transcript, we have no difficulty in finding compliance with the Sixth Amendment.

Second, even if GiGi feigned a lack of memory by refusing to attempt to refresh her recollection, defendants’ constitutional rights were not violated. (*Gunder, supra*, 151 Cal.App.4th at p. 420.)

Third, defendants pointed to no precedent in support of their contention that the trial court must require a witness to review a document to refresh her memory after the witness has stated that such review will not be helpful. The trial court did not abuse its considerable discretion to control the mode of questioning when it ruled GiGi was not evasive in the few instances in which she declined to attempt to refresh her recollection.

Fourth, the jury was able to observe GiGi’s demeanor when she testified that she could not remember what she said to the police. The jurors were able to make their own determination as to whether her answers were credible. The trial court instructed the jury pursuant to CALCRIM No.

226 to consider how well a witness could perceive the subject matter of her testimony, the ability of a witness to remember and describe what happened, the behavior of a witness while testifying, the attitude of a witness about the case and about testifying, and whether a witness made prior consistent or inconsistent statements. This instruction provided the jury with the necessary tools to assess GiGi's several refusals to consider refreshing her memory, and afford that conduct whatever weight it deserved.

Fifth, defendants cannot establish prejudice. (*People v. Byron* (2009) 170 Cal.App.4th 657, 676 [Confrontation Clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24]; see *People v. Ledesma* (2006) 39 Cal.4th 641, 709 (*Ledesma*).) Detective January specifically testified to the statements that were the subject of the last two unsuccessful requests to refresh GiGi's recollection, and the detective was not even asked about the first statement in dispute. The jury therefore heard testimony regarding two of the prior statements, and defendants made no attempt to bring out the third statement.

Evidence Supporting Torture Convictions

Carmouche contended that there was insufficient evidence to support her conviction for torture because the evidence did not demonstrate that she intended to cause cruel or extreme pain or suffering for the purpose of revenge, extortion, persuasion, or any sadistic purpose. Corder joins in her contention, arguing that if the evidence is insufficient to support Carmouche's torture conviction, his conviction as an aider and abettor must also be reversed. Substantial evidence supports both convictions.

Law

In assessing a claim of insufficiency of evidence, the appellate court's task is to review "the whole record in the light most favorable to the judgment . . . to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The federal standard of review is to the same effect: under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact

could have found the essential elements of the crime beyond a reasonable doubt.” (*Jackson v. Virginia* (1979) 443 U.S. 307, 319–320.) Where substantial evidence supports the jury’s finding, and other circumstances support a contrary finding, the jury’s finding will not be reversed. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Section 206 provides: “Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture. [¶] The crime of torture does not require any proof that the victim suffered pain.”

“Courts have interpreted intent to inflict “cruel” pain and suffering as intent to inflict extreme or severe pain.’ (*People v. Burton* (2006) 143 Cal.App.4th 447, 452 [(*Burton*)].)” (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1426 (*Hamlin*).) “Absent direct evidence of such intent, the circumstances of the offense can establish the intent to inflict extreme or severe pain.’ (*Burton, supra*, 143 Cal.App.4th at p. 452.)” (*Hamlin, supra*, at p. 1426.) It is not necessary that the defendant cause prolonged pain, or intend to do so. (*Id.* at p. 1427.) “A jury may consider the severity of the wounds in determining whether defendant intended to torture. (*People v. Mincey* (1992) 2 Cal.4th 408, 432–433.)” (*Burton, supra*, at p. 452.) “[A] jury may [also] infer intent to cause extreme pain from a defendant who focuses [her] attack on a particularly vulnerable area, such

as the face, rather than indiscriminately attacking the victim.’ [Citation.]” (*Hamlin, supra*, at pp. 1426–1427.) Intent can be reasonably inferred when the defendant “deliberately strikes [her] victim on an area of the body that is already injured.” (*Id.* at p. 1430.) “[S]carring and disfigurement constitute strong circumstantial evidence of intent to inflict severe pain and suffering.’ (*People v. Baker* (2002) 98 Cal.App.4th 1217, 1224.)” (*Burton, supra*, at p. 452.)

Discussion

Crutchfield rushed GiGi, punching her multiple times and knocking her to the floor. Carmouche knew that Crutchfield had hit GiGi in the head and continued to do so, yet she attacked GiGi mercilessly, using various weapons to batter, bruise, stab, and slash GiGi’s injured face and her breasts. She focused her attack on these specific, vulnerable areas of the body, attacking repeatedly. GiGi’s wounds were severe. She lost fingernails while trying to ward off her attackers. Carmouche hit GiGi in the head with a frying pan, knocking out two of her teeth. She sliced GiGi’s neck numerous times and then covered her mouth and nose until she lost consciousness. Following the attack, GiGi was placed in a medically induced coma, requiring a breathing tube. Her face and neck were permanently scarred, as the jury recognized when it convicted defendants of mayhem. (See *People v. Newby* (2008) 167 Cal.App.4th 1341, 1347

[mayhem requires a finding that the victim sustained “a permanent disfiguring injury”].) These facts strongly support the jury’s finding that Carmouche intended to torture GiGi.

We are not persuaded by the cases Carmouche relies upon to argue that torture requires more than the facts of this case demonstrate. That there are other cases in which the injuries suffered were more severe and the acts committed even more horrifying is of no moment. “There is no question there are cases in which the acts of torture were more gruesome. However, ‘[w]hen we decide issues of sufficiency of evidence, comparison with other cases is of limited utility, since each case necessarily depends on its own facts.’ (*People v. Thomas* (1992) 2 Cal.4th 489, 516.)” (*People v. Odom* (2016) 244 Cal.App.4th 237, 248.) The facts of this case amply support a finding of intent to torture.

Finally, there was substantial evidence that Carmouche tortured GiGi “for the purpose of revenge, extortion, persuasion, or [another] sadistic purpose.” (§ 206.) Evidence was presented that Carmouche was infatuated with Corder. She told him she would do anything to protect him. She told Crutchfield she would do “dumb shit” on Corder’s behalf. GiGi was Corder’s wife and was carrying his child. It would be reasonable for the jury to infer that Carmouche took sadistic pleasure in torturing and permanently disfiguring a perceived rival. Her concentration on GiGi’s face and breasts in a way that permanently disfigured and scarred GiGi further

corroborates this inference. In light of the facts, we conclude that Carmouche and Corder's torture convictions were supported by substantial evidence.

Witness Attire

Corder next argued that the trial court abused its discretion by requiring a fellow Marine who testified on his behalf to appear in civilian clothing. Corder argued that his witness, Lonel Springs, was prevented from presenting himself in the best possible light, which would have increased his credibility with the jury. He asserted that as an on-duty Marine, Springs should have been permitted to wear his uniform. We conclude that, even if the trial court abused its discretion, Corder's contention fails because he has not established prejudice.

Proceedings

At trial, the prosecution objected when Springs presented himself for testimony dressed in his Marine Corps uniform. The prosecutor argued that, under Evidence Code section 352, it would be prejudicial to allow the witness to wear his uniform. She asserted that Corder was attempting to use Springs's military service to bolster his credibility and sway the jury.

Corder's counsel responded that wearing the uniform would not be prejudicial: "That's what he is. So he is

wearing his uniform. Whatever the Marines' issue is, it is a Marines' issue. It is not for this court to decide."

The court questioned Corder's counsel regarding the decision to have Springs wear his uniform:

"The Court: Why is he wearing a uniform to testify in a civilian case?

"[Corder's counsel]: I gave him the option of what he wanted.

"The Court: Did you give him the option, or did you tell him to wear it?

"[Corder's counsel]: I gave him the option.

"The Court: Did he ask you whether he should wear it or not?

"[Corder's counsel]: Yes.

"The Court: And you said yes?

"[Corder's counsel]: Yes."

The court ruled: "Under [Evidence Code section] 352, I think that his wearing a uniform is, first of all, inappropriate in a civilian trial. [¶] Secondly, I agree with the People. I think that it will -- it was worn, in my opinion, given especially what you just told me, to allegedly add credibility to his testimony, and the wearing of the uniform, I think, adds nothing to the nature of his testimony. He allegedly witnessed an incident of domestic violence . . . in a private setting, not in an official capacity as a Marine. Even if he did, this trial has nothing to do with his being a Marine. [¶] So I think it is more prejudicial than probative. It would mislead the jury and it is not appropriate."

Corder's counsel stated that he would ask Springs whether it was a violation of Marine Corps policies or procedures to wear his uniform. The court said that it did not know whether it was a violation or not, but noted that it was a violation for police to testify in their uniforms regarding a private matter. Regardless, the court was not going to adjudicate matters of Marine Corps rules and procedures. The court was concerned solely with the impact on testimony.

Corder's counsel responded: "His whole testimony will take about five minutes, Your Honor. If the uniform changes -- I will be surprised if that changes anybody's mind on the facts of the case."

Later, Corder's counsel reported that he had spoken with Springs, who said the Marines permitted Springs to testify in a uniform. The trial court did not change its ruling.¹⁸

Springs testified that he and Corder met in the Marines in 2005, when they were stationed at Camp Pendleton. They served in Fallujah together. Springs and his wife became friends with Corder and GiGi when they returned to the United States, and saw them daily from 2006 until 2010. Springs recounted an incident in which he

¹⁸ Corder was allowed to address the court and stated, without any support, that Springs was on-duty and required to wear a uniform. Although Corder mentions his statement, on appeal he does not argue that Springs was required to wear his uniform at the hearing.

witnessed GiGi hit Corder with a broom, swinging it as if it was a baseball bat. Corder did not retaliate. Springs had never seen Corder act violently toward GiGi. He had last seen Corder in 2010. Corder had a reputation in the Marines for being “calm, cool, and collective [*sic*].” He had “helped [Springs] with [his] temper.”

Springs’s testimony spanned four pages of transcript. None of the parties elected to cross-examine him.

Discussion

We see no reason to delve into the merits of the issue. Given the weight of the evidence in this case, the argument that it was prejudicial error to refuse to allow Springs to testify in uniform borders on the absurd.

Springs’s testimony was very brief. The jury knew that Springs and Corder were Marines, and that Springs vouched for Corder’s character. It was undisputed Corder and GiGi had a volatile relationship, and GiGi had testified to hitting Corder with the broom. Springs was not a percipient witness to the charged crimes. His testimony had nothing to do with the attack on GiGi or Corder’s role in it. We see absolutely no possibility Corder would have obtained a more favorable result had Springs testified in uniform.

Posttraumatic Stress Disorder Evidence

Corder also contended that the trial court erred in ruling “that no mention could be made of PTSD, [and] opining that it was not a defense to any of the charges.” He argued that trial counsel’s failure to seek to have the PTSD evidence admitted on the ground that it supported a “diminished actuality” theory of defense—i.e. that Corder lacked the specific intent required to commit the charged crimes—was not forfeited because counsel was reacting defensively to “the pressure to state the relevance pre-trial [*sic*] and the court’s assertion that there was no PTSD defense to any of the charges,” and also because the argument was futile in light of the trial court’s ruling.¹⁹ Alternately, Corder argued he was prejudiced by counsel’s ineffective assistance in failing to seek admission of PTSD evidence on this basis.

We disagree with Corder’s characterization of the trial court’s ruling, and conclude there is no merit to his claim that trial counsel was pressured into abstaining from making a futile argument. Nor can we agree that defendant has established ineffective assistance of counsel, as trial counsel was not given an opportunity to explain his strategic decisions on the record, and Corder fails to establish that it

¹⁹ “[PTSD] evidence is admissible for the sole purpose of showing . . . ‘whether or not the accused actually formed a required specific intent, premeditated, deliberated or harbored malice aforethought, when a specific intent crime is charged’ (§ 28, subd. (a))” (*People v. Cortes* (2011) 192 Cal.App.4th 873, 908, italics omitted.)

is reasonably probable that the outcome of the trial was negatively affected by counsel's tactical choice.

Proceedings

With respect to the trial court's ruling, the following colloquy took place at a pretrial hearing on the prosecution's motion to exclude mention of PTSD:

"The Court: The People are seeking to exclude any reference to defendant Corder has [*sic*] PTSD, or -- [Corder's counsel], are you going to introduce evidence of defendant having post-traumatic stress disorder?

"[Corder's counsel]: I may. I may, based on cross-examination of GiGi and what is developed at the trial. It may come in. I don't think the court can rule on that issue pretrial. I think it will have to rule as it is confronted during the trial.

"The Court: No. I need to know about it now. [¶] First of all, what is the relevance of his PTSD?

"[Corder's counsel]: Well, there's text messages that refer to GiGi saying 'My husband died in Fallouja [*sic*].' She texted that. [¶] I think that would be relevant based on those text messages that are going to come out. [¶] One of the prosecution's theories, as the court is well aware, is that Mr. Corder did not want the child, and therefore he decided that he was going to kill GiGi because of that. [¶] They had a series of text messages. . . . It lasted most of a particular day and maybe into a second day about two months before

this incident in which GiGi expresses how upset she is with Mr. Corder, and Mr. Corder is explaining his side of it, and in that, one of those text messages, she said ‘My husband died in Fallouja [*sic*].’ [¶] Well, what does that mean? I want to find out what that means.

“The Court: How is that relevant?

“[Corder’s counsel]: It is relevant to explain what she’s talking about there, that he has -- it is all part of the case, whether he has PTSD or not. We’re not offering it as a defense or anything like that, but we’re offering it as part of the facts of the case.

“The Court: [Prosecutor]? How is it relevant that the defendant had PTSD?

“[Prosecutor]: I just didn’t want it coming out as some sort of a defense. If [Corder’s counsel] is saying he just wants to question GiGi about the messages and what she meant . . . and basically referring to the fact that he came back a different person, I don’t have an issue with that.

“The Court: Is that your intent?

“[Corder’s counsel]: Yes. That’s it.

“The Court: So you are going to introduce evidence asking GiGi to clarify the text message?

“[Corder’s counsel]: Yes. That’s all.

“The Court: You have no objection to that?

“[Prosecutor]: I don’t have an issue with that. I just didn’t want an expert at the last second talking about some type of psychological defense that I had never heard of.

“The Court: There is no such defense.

“[Corder’s counsel]: There will be no expert coming in. I can represent that.”

The trial court asked if either Carmouche or Crutchfield objected to admission of PTSD evidence on this limited basis. Carmouche’s counsel noted that there were many text messages and he would not know whether he would object until a specific issue arose. The trial court reiterated that the evidence would only be admitted in the limited context of the single text they had discussed. Corder’s counsel stated, “Among other things, it may relate to the other issues that come up. But there is no expert evidence.”

The court responded: “In addition to the expert evidence, I’m not allowing you to go into a detailed explanation of his PTSD condition. . . . I know the People are not objecting for you to probe into the clarification of the text messages that are going to be introduced, but we’re not going to be sidetracked with regards to that medical condition.” The court allowed the introduction of PTSD evidence for the limited purpose discussed.

Discussion

The record demonstrates that the court did not rule that all PTSD evidence was inadmissible, as Corder represents. The court allowed Corder to present evidence of his text message for the specific purpose mentioned by defense counsel. It is clear that Corder’s counsel had no

intention of presenting a diminished actuality defense on the basis of PTSD evidence, and was not pressured by the trial court in this regard. We view the trial court's statement that "[t]here is no such defense," and its prohibition on broader admission of the evidence as reassurance to the prosecution that Corder's counsel was not seeking to admit the PTSD evidence as a defense before trial, and would not be allowed to ambush the prosecution with the defense midtrial. Corder's counsel similarly reassured the prosecutor that he would not be calling an expert witness to testify regarding PTSD. The trial court did not err in its statements, nor did it force counsel into a position where he could not comfortably press for admission on a diminished actuality theory prior to trial. We cannot conclude the court abused its discretion in ruling that the defense would not be allowed to present evidence of a defense that it expressly eschewed. (See *People v. Vieira* (2005) 35 Cal.4th 264, 292 ["A trial court's decision to admit or exclude evidence is reviewable for abuse of discretion"].)

We reject Corder's contention that counsel was constitutionally ineffective. (*People v. Williams* (1998) 61 Cal.App.4th 649, 657.) To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was both deficient and prejudicial, i.e., that it is reasonably probable that counsel's unprofessional errors affected the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 693–694; *Ledesma, supra*, 43 Cal.3d at pp. 216–217.) "The Sixth Amendment guarantees competent

representation by counsel for criminal defendants[, and reviewing courts] presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions.” (*People v. Holt* (1997) 15 Cal.4th 619, 703, citing *Strickland v. Washington*, *supra*, 466 U.S. at p. 690; *People v. Freeman* (1994) 8 Cal.4th 450, 513.) If the record sheds no light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for an explanation and failed to provide one, or there could be no satisfactory explanation for counsel’s performance. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

On this record, we cannot conclude that counsel was ineffective for failing to seek admission of PTSD evidence to show that Corder lacked specific intent to commit the crimes. The record is silent as to the reason for counsel’s tactical choice. We have no way of knowing whether counsel had Corder examined for PTSD and if an expert would have been willing to testify to his condition. There is simply no ground for concluding counsel’s performance was deficient.

Cumulative Error

Corder and Carmouche argue the errors alleged, even if not individually prejudicial, are prejudicial when taken together. There was no cumulative error, as any error was inconsequential. (See *People v. Hines* (1997) 15 Cal.4th 997, 1075.)

DISPOSITION

The judgment is affirmed.

MOOR, J.

We concur:

RUBIN, P.J.

BAKER, J.